FRED J. SCHIKORA

IBLA 84-701 Decided October 31, 1985

Appeal from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, holding Native allotment application for approval and dismissing protest thereto. F-34694.

Appeal dismissed.

1. Administrative procedure: Standing--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of the Department of the Interior to Native Allotment Applicants--Appeals--Rules of Practice: Appeals: Standing to Appeal

The owner of improvements located on land described in a Native allotment application has standing to protest the allotment application under sec. 905 of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634 (1982). Standing to appeal favorable adjudication of the allotment application and rejection of the protest to the Board of Land Appeals requires a showing of a legally cognizable interest adversely affected by denial of the protest. The interest of a trespasser on the land without claim or color of right will not afford such standing.

APPEARANCES: Daniel R. Cooper, Jr., Esq., Fairbanks, Alaska, for appellant; Judith K. Bush, Esq., Fairbanks, Alaska, for appellee Evelyn Alexander.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Fred J. Schikora has appealed from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated March 27, 1984, holding the Native allotment application of Evelyn Alexander (appellee herein), F-34694, for approval and dismissing appellant's protest thereto.

On August 3, 1965, appellee filed a Native allotment application with BLM for two parcels of land, totalling 160 acres, pursuant to section 1 of the Act of May 17, 1906, as amended (the Native Allotment Act), formerly codified at 43 U.S.C. § 270-1 (1970) (repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1982), subject to applications pending on or before December 18, 1971). Parcels A and B were

described, respectively, as lying west of Willow Lake (40 acres) and east of the "Cooper small tract" between the Chatanika River and Willow Lake (120 acres). The land is located approximately 20 miles from Minto, Alaska. Appellee provided no information concerning her use and occupancy of the land in her application. On June 15, 1970, and April 28, 1969, BLM accepted the surveys, respectively, for parcel A (U.S. Survey No. 4452-A) and parcel B (U.S. Survey No. 4452-B).

On July 30, 1971, in response to a December 13, 1965, BLM decision requiring appellee to submit evidence of use and occupancy, appellee filed an amended application, claiming use and occupancy of the land in parcels A and B since January 1937 for the purpose of hunting, fishing, and ratting each year, during the months from January to March, May to June, and September to November. Appellee stated that the corners of the land were "marked and posted" and that the land was not "occupied or improved" by any other person. The land was described as U.S. Survey Nos. 4452-A and B. On November 23, 1971, appellee filed an amended description of the land included in her application, adding U.S. Survey No. 4037 (a 4.09-acre tract of land known as the Cooper small tract) to parcel B and deleting an area of similar acreage from parcel A. On December 20, 1971, appellee protested the Cooper small tract purchase application (F-23498), filed pursuant to section 1 of the Act of June 1, 1938 (the Small Tract Act), as amended, 43 U.S.C. § 682a (1982) (repealed effective Sept. 21, 1986). 1/

By memorandum dated January 19, 1972, the Chief Adjudicator, Alaska State Office, requested the District Manager, Fairbanks District Office, to prepare a field report with respect to appellee's amended parcels A and B. On January 20, 1975, a BLM realty specialist prepared two field reports, in which he stated that the parcels had been examined on October 2, 1973, in the company of appellee and her husband.

With respect to parcel A, the specialist stated appellee was "familiar" with the parcel but had "indicated that she had not been back to the parcel in at least five years because of the fact that she was getting old." Appellee was born on December 25, 1916. The specialist further reported that appellee stated she had hunted and fished along the edge of the adjacent lakes and that her grandson had used the area the previous winter, leaving evidence of a fire. The specialist noted a cabin, which appellee indicated "belonged to an individual in Fairbanks." In his report, the BLM examiner later stated: "I discovered that the cabin belongs to a Mr. Fred Schikora, the same man who bought Cooper's cabin (Small Tract Lease F-023498). He erected this cabin in 1961." The specialist further stated: "Mrs. Alexander said she reduced the size of the parcel from what it is surveyed because she

1/ The land included in the Cooper small tract purchase application had originally been applied for by George Cooper on June 15, 1959. The land was classified by BLM for disposition under the Small Tract Act on Dec. 1, 1959. Subsequently, this tract was leased to George Cooper with an option to purchase, effective May 1, 1960. This option was exercised on Nov. 18, 1960. By quitclaim deed dated June 19, 1968, Cooper conveyed his interest in the small tract (U.S. Survey No. 4037) to appellant.

felt the southern end is in the lake and covered with water. This reduction gives Mrs. Alexander additional acreage with which she could cover her selection of U.S. Survey No. 4037 on her second parcel, Parcel B." The specialist concluded that appellee had "used" parcel A "in a manner consistent with the requirements of 43 CFR 2561 for hunting, trapping, and ratting since 1937 for a period of at least five years," and that the "trespass cabin" had no bearing on appellee's use "because she has five years of continuous use prior to its erection [in 1961]."

With respect to parcel B, the specialist noted a campsite which had been used by appellee, several trails, and a cabin which appellee stated had belonged to her father. However, the specialist could find no evidence of appellee's use of the Cooper small tract. The specialist concluded that appellee had "used and occupied" parcel B, excluding the Cooper small tract, "in a manner consistent with 43 CFR 2561 since 1937 for hunting, trapping and fishing," and that appellee had "used" the Cooper small tract in similar fashion from 1937 to June 1959, when Cooper filed his application for a small tract lease.

By notice dated June 19, 1975, BLM stated that both parcels A and B, excluding the Cooper small tract, were "approved" and that a supplemental plat would be prepared to reflect the deletion of a 4.09-acre tract from parcel A. However, BLM further stated that it was apparent appellee did not qualify for the Cooper small tract and required appellee to submit, within 60 days of receipt of the notice, "substantive evidence to demonstrate your entitlement to U.S. Survey 4037." In the absence of such evidence, BLM stated that "a decision will be issued rejecting your application only as to U.S.S. 4037." On July 22, 1975, appellee filed a statement, dated July 14, 1975, in which she stated that her family used the Cooper small tract, as a "spring camp" for trapping and berrypicking and for hunting in the fall and that she had trapped as recently as a "few winters ago." She explained that her father was blind and she would go out on the land "by myself." She also stated that "[w]e cut a trail through to the lake this spring" and that she had gone there "every spring since I was young."

By decision dated September 2, 1975, BLM rejected appellee's application with respect to the Cooper small tract and dismissed her December 1971 protest, concluding appellee had failed to demonstrate qualifying use and occupancy. BLM stated that appellee, despite her former use and occupancy, had not shown she was using and occupying the land to the potential excusion of others at the time she filed her application where Cooper had built a cabin and was living on the land. On October 3, 1975, appellee filed an appeal from the September 1975 BLM decision.

In Evelyn Alexander, 45 IBLA 28, 35 (1980), the Board affirmed the September 1975 BLM decision, concluding as a matter of law that appellee's claim to the Cooper small tract must be rejected. The Board noted that Cooper had filed a Small Tract Act application for the land in 1959, that it had been classified by BLM for that purpose, that he had subsequently occupied the land and constructed a cabin thereon pursuant to the lease with option to purchase issued to him by BLM, and that appellee's original Native allotment application had recognized this occupancy, defining the boundary of the allotment application by reference to the boundary of the Cooper small

tract. In light of these factors, the Board found appellee's use and occupancy of the Cooper small tract since 1959 could not have been even potentially exclusive. The Board also held that BLM should "readjudicate" appellee's qualifications to receive "any of the other land for which she has applied." Evelyn Alexander, supra at 37.

Subsequently, after remand, appellant filed a protest with BLM on May 28, 1981, challenging appellee's entitlement to parcel A. The protest was filed pursuant to section 905(a)(5)(C) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5)(C) (1982). By notice dated December 28, 1983, BLM informed appellee that it intended to readjudicate appellee's application as to the remaining land in accordance with the Board's decision in Evelyn Alexander, supra. BLM noted the Board's decision had "effectively suspended" its prior approval of the application in its June 1975 notice. BLM also stated that the application was not legislatively approved under ANILCA but must be adjudicated, as required by section 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), because the land had been "selected by the State of Alaska since October 4, 1960," under selection applications F-26827 and F-26829. BLM afforded appellee 60 days from receipt of the notice to submit evidence of use or occupancy between 1960 and 1965, when she filed her application. BLM noted appellee had "demonstrated substantial use and occupancy" between 1937 and 1960, but that since 1960 her possessory rights could have been terminated "upon the cessation of actual use or occupancy" prior to filing an application.

On February 28, 1984, appellee filed with BLM affidavits signed by appellee, James Alexander, Cerosky Charlie, and Susie Jimmie. In her affidavit, appellee stated she has "gone to my land practically every year since the 1930's," setting up a camp or tent and engaging in subsistence hunting and fishing. Appellee stated that her father ran a trapline through parcel A and she helped him because he was "going blind," that she began to use the line herself when she was 17, i.e., in 1933, and that she likewise runs a trapline from parcel B, along the Chatanika River "through my Parcel A." Appellee further stated: "I know I was there between 1960-1965. I remember 1963, for instance, when Susie Jimmie joined me in my camp with her little grandson who was born that year." Appellee stated her spring camp "is usually on Parcel B," but that she hunted and fished "on my allotment parcels." James Alexander, appellee's husband, in his affidavit, confirmed the existence of appellee's trapline and stated appellee has "gone to her parcels at different times of the year--sometimes in the spring for ratting, sometimes in the spring or fall for fishing." He stated appellee has "never stopped using her land." Cerosky Charlie, who camped across from appellee's spring camp "until at least 1964," stated in his affidavit that appellee has continued to run traplines "in that area * * * up to the present time" and to use her land for ratting and fishing. Susie Jimmie, a friend of appellee, stated in her affidavit that she visited appellee in 1963, that "everyone" in Minto, Alaska, knows appellee "goes out to her land every year," and that she visits appellee every year "at her spring camp."

In its March 1984 decision, BLM held appellee's Native allotment application for approval and dismissed appellant's protest because "it has been determined that the applicant * * * satisfies the use and occupancy requirements" of the Native Allotment Act. BLM stated that any improvements

placed on parcel A by appellant are "in trespass." BLM further stated: "Because there is no evidence that U.S. Survey No. 4452 B [presumably U.S. Survey No. 4452-A] was incorrectly performed, Ms. Alexander's amendment of November 23, 1971 is not permitted." BLM, thus, held parcels A and B, totalling 159.32 acres, as described prior to their amendment, for approval. In addition, BLM held State selection applications F-26827 and F-26829 and selection application F-22755, filed by the regional corporation (Doyon, Limited) on June 29, 1976, for rejection, to the extent of the conflict with appellee's application. BLM afforded the State of Alaska and appellant 60 days from receipt of the decision to initiate a private contest or the BLM decision would become final "without further notice." Appellant has appealed from the March 1984 BLM decision.

In his statement of reasons for appeal, appellant contends BLM erred in determining that appellee had satisfied the use and occupancy requirement of the Native Allotment Act with respect to parcel A. Appellant argues appellee's evidence at best establishes slight and sporadic use of the land and that, even if appellee's use is held to be substantial and continuous, there is no evidence that appellee has occupied the land. Appellant notes there is no visible evidence of appellee's use of the land, including the reported marks and posting. Appellant also argues that appellee, by her own admission to the BLM realty specialist, abandoned the land in approximately 1968 and her application should be rejected for that reason. 2/

Appellant submits affidavits signed by himself; Rick J. Schikora, appellant's son; and Sam J. Snyder, who lived on parcel A in appellant's cabin between June and August 1963. In his affidavit attached to his statement of reasons for appeal, appellant explains the circumstances surrounding his construction of the cabin on appellee's parcel A. Appellant explains that in the spring of 1961 he flew into the Minto Lakes area to look for a recreation cabin site for a hunting camp. After having found a site, appellant relates that:

> 4. When I was back in town I went to the BLM office on Second Avenue to file for a five acre recreation site. I was told that the State of Alaska had recently selected that particular area and that I should go to the ADL office (Alaska Division of Lands) in the State Office Building and deal with them.
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> 5. At the ADL office I met with [the official] who headed the office and whom I had known for many years. He advised me that the State had indeed recently selected the ground (September 29, 1960) and that the State was not able to accommodate me in this matter. As a friend, knowledgeable about land matters and not as an official of the ADL, he told me that the

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2/ Contrary to appellant's allegation, abandonment of a Native allotment after an application has been filed requires a subjective intent to abandon rather than a mere cessation of use. See United States v. Flynn, 53 IBLA 208, 235-36, 88 I.D. 373, 387-88 (1981).

> BLM, the ADL, the BIA and the selection and approval process were in such disarray that we would be dead before the situation was straightened out. He said that if he were I, that he would just go ahead and build the cabin.
>
> 6. I bought the materials and * * * loaded everything in a DC-3 aircraft, flew to the site, landed on the ice and unloaded the materials on site in April, 1961.
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> 7. In July, 1961, * * * I flew to the site * * * and built a 16 X 16 insulated frame cabin. (Several years later I added an 8 X 16 porch). 3/

Thus, with respect to the cabin on parcel A, unlike the Cooper small tract, it is clear that appellant had no legal claim to the land on which he built the cabin and that appellant knew he was in trespass as to this land.

[1] Section 905(a)(5)(C) of ANILCA extended to the owner of improvements situated on land claimed in a Native allotment application the standing to protest the application, thus requiring the Department to adjudicate the application under the Native Allotment Act. 43 U.S.C. § 1634(a)(5)(C) (1982). The decision of BLM fulfilled this obligation. Standing to appeal to this Board requires a showing that appellant is adversely affected by the decision appealed from. 43 CFR 4.410. An unsuccessful protestant must show that a legally cognizable interest has been adversely affected by denial of the protest. Oregon Natural Resources Council, 78 IBLA 124, 125-26 (1983); In re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982). In Pedro Bay Corp., 78 IBLA 196, 199 (1984), the Board found that such an interest was shown by a Native corporation claiming land within an allotment under an interim conveyance pursuant to ANCSA, 43 U.S.C. §§ 1601-1628 (1982). See also Pedro Bay Corporation, 88 IBLA 349 (1985). We are unable to find that the interest of a trespasser upon the land without claim or color of right constitutes such a legally cognizable interest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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C. Randall Grant, Jr.
Administrative Judge

We concur:

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Franklin D. Arness
Administrative Judge

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James L. Burski
Administrative Judge

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3/ Appellant also indicates in his affidavit that his cabin has now been removed from parcel A.